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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
BECKERING, P.J., and BORRELLO and GLEICHER, JJ.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 151843
Plaintiff-Appellant,	Court of Appeals No. 318560
v	Ionia Circuit Court No. 13-15693-FH
FLOYD PHILLIP ALLEN,	
Defendant-Appellee.	

_____/

BRIEF ON APPEAL OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

ORAL ARGUMENT REQUESTED

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Dated: December 30, 2015

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STATEMENT OF JURISDICTION

The People filed an application for leave to appeal as required by MCR 7.305, which this Court granted on November 4, 2015. This Court has jurisdiction over the appeal under MCR 7.303(B)(1).

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STATEMENT OF QUESTION PRESENTED

1. This Court and the Court of Appeals have held that, where a recidivist scheme elevates the offense rather than enhances the punishment, it is proper to enhance the sentence for a repeat offender for the elevated offense using the habitual-offender provisions. In SORA, the Legislature has created three separate offenses for violations, rather than creating a sentence-enhancement provision. Did the trial court properly enhance Allen's recidivist conviction under the habitual-offender statute?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

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STATUTES INVOLVED

MCL 28.729 provides in part:

(1) Except as provided in subsections (2), (3), and (4), an individual required to be registered under this act who willfully violates this act is guilty of a felony punishable as follows:

> (a) If the individual has no prior convictions for a violation of this act, by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.
>
> (b) If the individual has 1 prior conviction for a violation of this act, by imprisonment for not more than 7 years or a fine of not more than $5,000.00, or both.
>
> (c) If the individual has 2 or more prior convictions for violations of this act, by imprisonment for not more than 10 years or a fine of not more than $10,000.00, or both.

MCL 769.10 provides in part:

(1) If a person has been convicted of a felony . . . , and that person commits a subsequent felony within this state, the person shall be punished . . . as follows:

> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may place the person on probation or sentence the person to imprisonment for a term that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term.

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INTRODUCTION

Defendant–Appellant Floyd Allen has now twice violated the sex offenders registration act, most recently by registering at one address (which was uninhabitable), while he was actually staying with his wife (in violation of a no-contact order) at a different address. Allen was convicted of violating SORA, second offense, and sentenced as a second-offense habitual offender.

On appeal to the Court of Appeals, Allen argued that this constituted an impermissible double-enhancement. Ignoring all case law to the contrary, the Court of Appeals agreed and ordered Allen's sentence vacated. This was error requiring reversal.

This Court and the Court of Appeals have held that where a recidivist statutory scheme elevates the offense based on repeat offenses, that a sentence for a recidivist conviction may be elevated using the habitual-offender statutes. This Court held that this was true with respect to OUIL, third offense, in *People v Bewersdorf*, 438 Mich 55 (1991). The Court of Appeals held that this was true with respect to first-degree retail fraud, in *People v Eilola*, 179 Mich App 315 (1989). The Court of Appeals also held this was true with respect to fleeing and eluding, second offense, in *People v Lynch*, 199 Mich App 422 (1993).

On the other hand, when a recidivist statutory scheme enhances the sentence, as in the public health code, MCL 333.7413(2) and (3), then further enhancement under the habitual-statutes is not permitted. E.g., *People v Fetterley*, 229 Mich App 511 (1998).

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The question here is whether the recidivist provisions of SORA, MCL 28.729(1)(b) and (1)(c), constitute separate offenses, like the statutes examined in *Bewersdorf*, *Lynch*, and *Eilola*, or whether they enhance the sentence, as in § 7413(2). The answer is that they are separate offenses, and habitual-offender enhancement is proper.

An examination of the language the Legislature has chosen confirms this answer. Comparison to the statutes discussed in the case law confirms this answer. Allen even *concedes* this answer, relying instead on an unsupported argument that the only thing improper here was using the same prior conviction to elevate the offense and enhance the sentence.

The Court of Appeals thus erred when it held that a conviction of SORA violation, second offense, could not be enhanced using the second-offense habitual offender statute. This Court should reverse.

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STATEMENT OF FACTS

The facts surrounding the criminal offense in this case are not relevant to the pure legal question presented in this appeal. The following statement of facts is drawn from the summary provided in the opinion below, *People v Allen*, 310 Mich App 328 (2015) (10a–12a).

Defendant–Appellee Floyd Allen was convicted in 2007 of fourth-degree criminal sexual conduct, and required to register under the sex offenders registration act, MCL 28.721 to 736 (SORA). (10a.) Allen registered an address on Clarksville Road in Clarksville in April 2012, and, as required by SORA, verified the same address the following January. (10a.) Two months later, Michigan State Trooper James Yeager received an anonymous tip that Allen was not complying with SORA. (10a.) The tipster gave Yeager an address on West Riverside Drive in Ionia. (10a.) Yeager first investigated the Clarksville Road address Allen had registered. (10a.) He visited three times, and found that there was a trailer home on the property that appeared uninhabited and uninhabitable. (10a–11a.) The second and third times he visited, he saw no footprints or tire tracks in the snow other than those he and his partner created on their previous visits. (10a–11a.)

Trooper Yeager then went to the West Riverside Drive address. (11a.) Allen was at that house, along with his wife (in violation of a probation condition that forbade Allen from having any contact with her). (11a.) Yeager asked Allen where he had been staying, and Allen claimed that he was staying at the Clarksville Road address. (11a.) Confronted with the results of Yeager's investigation, Allen admitted that he had not been staying there, though he continued to claim that the

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trailer was habitable, and even claimed he was planning to stay there that night. (11a.) Allen gave Yeager another address where he claimed to have been staying. (11a.)

On investigating that address, Tpr. Yeager spoke with Lucinda Pilot, who knew Allen. (11a.) Pilot told Yeager that Allen was not living with her, and was not living at the Clarksville Road address. (11a–12a.) She said she did not know where Allen was staying, but once she had taken him to his wife's home on West Riverside Drive at night, and picked him up there the following morning. (11a.)

PROCEEDINGS BELOW

Allen was charged with one count of failing to register as a sex offender, second offense (SORA-2), MCL 28.729(1)(b). (1a.) The People also filed a notice of intent to seek an enhanced sentence under the second-offense habitual offender statute, MCL 769.10. (1a.)

The jury found Allen guilty. (23a–26a.) The trial court sentenced him to 24-to-126 months (2 to 10-and-a-half years) in prison. (27a–28a.)

Allen appealed, raising three challenges to his conviction and three challenges to his sentence. Relevant here, he raised the following claim:

> Mr. Allen is entitled to a re-sentencing because the trial court erred by enhancing his sentence under both the habitual offender statute and the SORA violation second offender statute.

In a published opinion per curiam, the Michigan Court of Appeals rejected Allen's other claims, but ordered his sentence vacated and a remand for

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resentencing based on what it perceived as the trial court's error in enhancing Allen's sentence under MCL 769.10. *People v Allen*, 310 Mich App 328 (2015) .

The People sought leave to appeal. Allen did not seek leave to appeal as cross-appellant. This Court granted the People's application, and ordered the parties to address "whether the second-offense habitual-offender enhancement set forth under MCL 769.10 may be applied to the sentence prescribed under MCL 28.729(1)(b)." (11/4/15 Order.)

STANDARD OF REVIEW

The question presented is one of the interpretation of Michigan statutes, which this Court reviews de novo. *People v Gardner*, 482 Mich 41, 46 (2008).

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ARGUMENT

I. Because the Legislature created separate offenses for multiple violations of SORA, the sentence for Allen's elevated recidivist offense could also be enhanced using the habitual-offender statute.

Allen was convicted of SORA-2, and the prosecutor filed a notice to enhance his sentence under MCL 769.10. MCL 769.10 empowers the trial court to sentence a defendant "to imprisonment for a maximum term that is not more than 1-½ times the longest term prescribed for a first conviction of *that offense* . . . ." (emphasis added). The question is what is meant by "that offense." The People's view, approved by the trial court, is that "that offense" is SORA-2. A first conviction of SORA-2 is punishable by a maximum of 7 years' imprisonment. Thus, a SORA-2 sentence enhanced by MCL 769.10 is punishable by up to 10-½ years in prison.

Allen's view is that "that offense" is any violation of SORA's provisions. A first conviction of violating SORA's provisions is punishable by a maximum of 4 years' imprisonment. MCL 28.729(1)(a) ("SORA-1"). Thus, a SORA violation sentence enhanced by MCL 769.10 would be punishable by up to 6 years in prison. In the Court of Appeals' view, SORA-2 constitutes a separate enhancement provision, which conflicts with, and prevails over, the enhancement provision imposed by MCL 769.10. Thus, it held that a 7-year maximum sentence was appropriate.

The crux of this case is whether the Legislature intended to create separate substantive offenses for repeated violations of SORA, or whether SORA violation is a single offense with sentencing enhancement provisions. Statutory evidence,

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controlling case law from this Court, and persuasive case law from the Court of Appeals, are all in agreement: the recidivist SORA provisions are separate offenses.

A. Statutory evidence confirms the Legislature's intent to create separate substantive offenses for repeated violations of SORA.

Perhaps the strongest piece of evidence that the Legislature intended to create separate offenses out of SORA-1, SORA-2, and SORA-3, MCL 28.729(1)(c), is the way the Legislature treated these three offenses in the statute defining the category and class of these three offenses, MCL 777.11b. Not only are SORA-1, SORA-2, and SORA-3 each listed separately on this list of offenses, but they are not even the same class of offense: SORA-1 is a class F felony, while SORA-2 and SORA-3 are class D felonies. *Id.* If SORA violation were one offense, with increasing levels of punishment, it would have one offense class.

Another statutory piece of evidence is the fact that the maximum penalty for SORA-2 is not given in terms of the maximum penalty for SORA-1, and the maximum penalty for SORA-3 is not given in terms of the maximum penalty for SORA-1 or SORA-2. That is, the Legislature could have provided that the maximum penalty for SORA-2 is 1.75 times the four-year penalty for SORA-1, and that the penalty for SORA-3 is 2.5 times the penalty for SORA-1. But it did not. Instead, each separate offense has a separate penalty which does not refer to the other offenses. In contrast, the punishment for subsequent controlled substance offenses is governed by MCL 333.7413(2) and (3), which provides that a second or subsequent offense is punishable by imprisonment not more than twice the term

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otherwise authorized, or a fine not more than twice (§ 7413(2)) or three times (§ 7413(3)) the amount otherwise authorized.

B. This Court's holding in *Bewersdorf*, which Allen and the Court of Appeals have ignored, controls this question.

A similar question to the one here was presented to this Court in *People v Bewersdorf*, 438 Mich 55 (1991). In that case, which consolidated two appeals, the defendants (Bewersdorf and Johnson) were charged with operating a motor vehicle while under the influence of intoxicating liquor, third offense (OUIL-3), MCL 257.625(9)(c) (then MCL 257.625(6)). 438 Mich at 60. They were also subject to sentence enhancement under MCL 769.10. *Id.* The question was whether the sentence under OUIL-3 could be enhanced using MCL 769.10. In Bewersdorf's case, the Court of Appeals (relying on *People v Tucker*, 177 Mich App 174 (1989)) had held that the motor vehicle code's provisions conflicted with, and prevailed over, MCL 769.10. *Id.* at 61.

This Court analyzed the OUIL statutes and the habitual-offender statutes, and concluded, "While the habitual offender act, which is found in the Code of Criminal Procedure, establishes a procedure for enhancing a sentence, it is clear that the OUIL provisions of the Motor Vehicle Code establishes crimes. Because OUIL-3 is a separate crime, the prosecutor must prove all elements of the offense, including the prior convictions." *Id.* at 68. Based on this, this Court "read the two statutes so as to give effect to both," holding that

> the Legislature intended that the sentence for an OUIL-3 felony, if it is a first felony conviction, shall be as provided in the Motor Vehicle Code: imprisonment for not less than one or more than five years . . . .

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> However, any subsequent OUIL felony is subject to the repeat offender provisions of the habitual offender act regardless of whether the underlying felony conviction is also an OUIL-3 offense. We believe this is the plain meaning of the two statutes when read together, and that such a construction is consistent with the legislative purpose to deter repeated criminal acts by providing escalating punishment. [438 Mich at 70 (footnote omitted).]

The statutory scheme at issue here is, in all relevant respects, the same as the OUIL scheme examined in *Bewersdorf*. Just as *Bewersdorf* held that "it is clear that the OUIL provisions of the Motor Vehicle Code establish crimes," and that "OUIL-3 is a separate crime" from other OUIL offenses, the same is true of SORA. Just as MCL 257.625(9) creates three separate crimes under (a) (first offense), (b) (second offense if committed within 7 years of prior conviction), and (c) (third or subsequent offense), SORA creates three separate crimes under MCL 28.729(1)(a) (first offense), (b) (second offense), and (c) (third or subsequent offense). This is likewise true of other statutory schemes of commonly charged offenses, such as domestic violence, MCL 750.81(2), (3), (4). In creating the SORA scheme here, just as the Legislature permitted OUIL-3, second habitual offense and DV-3, second habitual offense, it contemplated SORA-2, second habitual offense.

Neither Allen nor the Court of Appeals offers any basis on which to distinguish or criticize *Bewersdorf*—the Court of Appeals did not cite *Bewersdorf* at all in its opinion, and Allen did not cite it in his briefs for any substantive point or attempt to distinguish it. Nor has Allen sought to have *Bewersdorf* overruled. The Court of Appeals erred in failing to acknowledge and follow controlling precedent from this Court. This Court should correct that error by reversing the erroneous holding of the Court of Appeals.

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Although *Bewersdorf*'s most important holding is that OUIL-3 is a separate crime, two other points deserve mentioning. This Court noted in *Bewersdorf* that "[s]tatutes which may appear to conflict are to be read together and reconciled, if possible." 438 Mich at 68, citing *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 65 (1974); *People v Buckley*, 302 Mich 12, 22 (1942). Thus, even if the court below had been correct in holding that SORA-2 *appeared to* conflict with MCL 769.10, it should have adopted the People's interpretation in order to reconcile the two statutes. Secondly, the *Bewersdorf* Court also pointed out that the Legislature has amended the habitual-offender statutes to exclude certain offenses from its application. 438 Mich at 71–72, citing 1978 PA 77. This Court took the fact that the Legislature had *not* chosen to exempt the OUIL felonies as evidence that the habitual offender statutes did apply. *Id.* at 72. Similarly, the Legislature has not chosen to exempt the SORA offenses from the habitual offender statutes, which supports the People's argument that the habitual offender statutes apply.

C. Persuasive authority from the Court of Appeals sheds valuable light on the question.

Not only was the decision below contrary to *Bewersdorf*, it also conflicted with several decisions of the Court of Appeals, which should have controlled, or at a minimum provided persuasive arguments bearing on the case. The Court of Appeals ignored all of these cases, which contributed to its error.

Chief among the well-reasoned and persuasive Court of Appeals authority applicable here is *People v Fetterley*, 229 Mich App 511, lv den 459 Mich 866 (1998). That case involved the question whether a recidivist controlled-substance sentence

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could be enhanced under both the provisions of the public health code providing for enhancement, MCL 333.7413(2), and the third-offense habitual-offender statute, MCL 769.11. The court carefully examined *Bewersdorf* along with several prior Court of Appeals decisions, and found that, although some of the cases allowed application of the habitual-offender statutes and others did not, the cases were all in harmony.

The unifying principle, based on a "careful reading of the cases," was that the application of the habitual-offender statutes depended on whether the other recidivist provision enhanced the sentence, or elevated the offense. 229 Mich App at 540–541. If, as in the case of § 7413(2), the *sentence* was enhanced, then additional sentence enhancement under the habitual-offender provisions was not permitted. *Id.* at 540, citing *People v Elmore*, 94 Mich App 304 (1979); *People v Edmonds*, 93 Mich App 129 (1979). But where the recidivist scheme "elevates the *offense*, rather than enhances the punishment," then the application of the habitual-offender statutes *is* permitted. *Id.* at 540–541, citing *Bewersdorf*; *People v Lynch*, 199 Mich App 422 (1993); *People v Brown*, 186 Mich App 350 (1990), lv den 439 Mich 873 (1991) (having been held in abeyance for *Bewersdorf*); *People v Eilola*, 179 Mich App 315 (1989); (emphasis added).

Lynch, *Brown*, and *Eilola* also provide strong persuasive support for the application of the habitual-offender enhancement. In *Eilola*, the Court of Appeals held that the habitual-offender provisions could be used to enhance a sentence for a recidivist conviction of retail fraud, MCL 750.356c(2). 179 Mich App at 325. In *Brown*, the Court of Appeals reaffirmed this holding, and extended it by holding

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that the sentence could be enhanced using the same conviction used to elevate the offense (answering a question left open in *Eilola*). 186 Mich App at 356–357. And in *Lynch*, the Court of Appeals (relying on *Eilola* and *Bewersdorf* and citing *Brown*) held that the habitual-offender provision could enhance a sentence for a recidivist conviction of fleeing and eluding, MCL 750.479a(4). 199 Mich App at 423–424.

The court below did not attempt to distinguish these cases—in fact, it did not cite *Fetterley*, *Lynch*, or *Eilola* at all, and it cited *Brown* only for the uncontroversial proposition that, "Where there is a conflict [between sentencing schemes], the specific enhancement statute will prevail to the exclusion of the general one." 310 Mich App at __, slip op. at 12. This failure to consult controlling and persuasive authority, again, led to the Court of Appeals' error in reversing the trial court. This Court should reverse.

D. Allen has conceded that the Court of Appeals erred.

It bears noting that Allen agrees with the People that there is no error in enhancing a SORA-2 sentence under MCL 769.10. The only point of contention between Allen and the People is whether the prior conviction used to elevate the offense to SORA-2 can be the same conviction used to justify the habitual-offender enhancement. In his brief before the Court of Appeals, he candidly allowed, "[H]ad some other prior felony conviction (other than the previous conviction for Failing to Comply with SORA) been used to charge Mr. Allen as a 2nd Felony Habitual Offender, he could have been sentenced to a maximum of 10.5 years." (Def's Br on

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Appeal, p 25.) He repeated the concession in his brief in opposition to the People's application for leave to appeal filed in this Court. (Q.v., p 5.)

There is no basis for Allen's argument. Assuming, as the People contend and he concedes, that elevation of the offense and enhancement of the sentence are proper using different prior convictions, there is no reason why the same prior conviction could not serve both purposes. See *Brown*, 186 Mich App at 357 ("[B]ecause different statutory schemes are involved, a conflict does not arise from the mutual application of the two statutes to the same prior conviction.") Indeed, it is not at all unusual for the same conviction can be used to increase a sentence in two or more different ways—for example, a conviction counted for PRV 1 or PRV 2 can also be used to support a habitual-offender enhancement. In fact, if the facts aligned just right, a single conviction could be used to increase a defendant's sentence five ways: under (a) PRV 1 or PRV 2, (b) OV 11 or OV 12, (c) OV 13, (d) a recidivist offense-elevation scheme, *and* (e) a habitual-offender provision, all at the same time. As long as each enhancement is allowed by statute, and the Legislature has not forbidden double-enhancement (see, e.g., MCL 777.42(2)(c), MCL 777.43(2)(c)), there is no problem.

E. Resentencing is not required.

In the Court of Appeals, Allen also challenged the trial court's scoring of prior record variable 7 (PRV 7) at 10 points. The People conceded that PRV 7 was misscored, but argued that resentencing was not required because the error did not affect Allen's sentencing guidelines. Although the court below agreed with Allen

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and the People that PRV 7 was misscored, it is not clear from the opinion whether the court felt that error required resentencing or not. To the extent the court below held that the scoring error required resentencing, it erred.

In any event, however, the question is now moot (and indeed was moot at the time the Court of Appeals decided it). The question of PRV scoring only affects Allen's minimum sentence. Allen became eligible for parole March 24, 2015 (and was paroled on the same date), more than a month before the decision below issued. Because a minimum sentence determines parole eligibility, and because Allen is already parole-eligible, he can have no meaningful relief on questions relating to his minimum sentence. Thus, the appropriate remedy in this case is to simply reverse the decision of the Court of Appeals and allow the trial court's sentence to stand.[1]

[1] Allen has contended that his release on parole renders the question presented in this appeal moot. He is mistaken. The application of MCL 769.10 affects both the minimum and maximum sentence. Because Allen could still violate his parole and be returned to prison, his maximum sentence still matters.

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CONCLUSION AND RELIEF REQUESTED

For these reasons, the People respectfully request that this Court reverse the decision of the Court of Appeals and affirm Allen's sentence.

Respectfully submitted,

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